IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 02-00731
v.	:	
	:	CIVIL ACTION
TARIQ SHABAZZ a/k/a Tyrone Johnson	:	NO. 05-4717

Memorandum and Order

YOHN, J. October ___, 2006

Defendant Tariq Shabazz, also known as Tyrone Johnson, has filed a Motion to Vacate, Set Aside or Correct Sentence under Title 28 U.S.C. § 2255. Shabazz filed this motion on August 15, 2005, twenty-four days after the one-year statutory filing period contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") had elapsed. Because the motion is untimely, as discussed below, I will deny the motion without an evidentiary hearing.

I. BACKGROUND

On May 29, 2003, Shabazz was found guilty by a jury of possession of a weapon by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). On September 10, 2003, this court sentenced Shabazz to 46 months of imprisonment. Shabazz filed a timely appeal, and the Third Circuit affirmed his conviction on April 23, 2004. Shabazz filed the instant motion on August

15, 2005.[1] The government responded to Shabazz's motion on December 12, 2005, arguing, *inter alia*, that Shabazz's motion is time-barred by the one-year statutory filing deadline contained in AEDPA. On February 1, 2006, this court ordered Shabazz to file a brief on or before March 15, 2005 setting forth any argument which he may have as to why the statute of limitations contained in AEDPA should be equitably tolled. Shabazz argued that the statute of limitations should be equitably tolled because (1) the prison where Shabazz was incarcerated was on lockdown status during portions of the months of February and March 2005[2] and (2) Shabazz's attorney failed to respond to his repeated requests for copies of transcripts from his suppression hearing, trial and sentencing.

II. DISCUSSION

Shabazz's motion is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 326 (1997). Under AEDPA, a federal prisoner seeking habeas relief pursuant to 28 U.S.C § 2255 must file his motion within one year of the date on which his judgment of conviction became final. 28 U.S.C. § 2255; *see also Burns v. Morton*, 134 F.3d 109, 111–12 (3d Cir. 1999). A defendant's judgment of conviction becomes final within the meaning of § 2255 "on the later of (1) the date on which the Supreme Court

[1]The clerk received Shabazz's motion on August 31, 2005, but Shabazz's signature on the motion was dated August 15, 2005. For *pro se* motions, the motion is considered to have been filed when the prisoner puts it into the prison mail system, regardless of when the district court clerk actually gets it. *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998).

[2]Shabazz has submitted documentation from FCI McKean, the prison where he has been incarcerated, verifying that the facility was on lockdown status from February 10, 2005 though February 17, 2005, and again on February 22, 2005 until March 28, 2008. (Ex. C of Reply to Gov't's Resp. to Def.'s § 2255 Mot.)

affirms the conviction and sentence on the merits or denies the defendant's timely filed petition for certiorari, or (2) the date on which the defendant's time for filing a timely petition for certiorari review expires," which is ninety days from the date on which the court of appeals affirms the judgment of conviction. *Kapral v. United States*, 166 F.3d 565, 577 (3d Cir. 1999). Here, Shabazz did not seek review with the Supreme Court, and thus, his conviction became final on July 22, 2004, ninety days after the Third Circuit affirmed his judgment of conviction. Given that he did not file the instant motion until August 15, 2004, under AEDPA, it would be time-barred.

However, the Third Circuit has held that the statute of limitations in AEDPA is subject to the doctrine of equitable tolling. "Equitable tolling is available only when the principle of equity would make the rigid application of a limitation period unfair. The Third Circuit holds that there are two general requirements for equitable tolling: (1) that the [defendant] has in some extraordinary way been prevented from asserting his or her rights; and (2) that the [defendant] has shown that he or she exercised reasonable diligence in investigating and bringing the claims." *Merritt v. Blaine*, 326 F.3d 157, 161 (3d. Cir. 2003). Courts should be sparing in their use of equitable tolling, applying it "only in the rare situation where [it] is demanded by sound legal principles as well as the interests of justice." *LaCava v. Kyler*, 398 F.3d 271, 275 (3d Cir. 2005) (internal citations omitted). A court may equitably toll the statute of limitations only when: (1) the government has actively misled the defendant; (2) the defendant has timely asserted his rights but in a wrong forum; or (3) the defendant has in some extraordinary way been prevented from asserting his rights. *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999).

For the reasons that follow, Shabazz's claims of a prison lockdown and his attorney's

failure to provide him with copies of his suppression hearing, trial and sentencing transcripts, cannot provide a sufficient basis for equitable tolling of AEDPA's one-year statute of limitations for filing a §2255 motion.

A. Prison lockdown

Prison lockdowns are not normally considered extraordinary circumstances warranting equitable tolling of AEDPA's one-year statute of limitations. In *United States v. Ramsey*, 1999 U.S. Dist. LEXIS 13653, at *4 (E.D. Pa. Dec. 9, 1999), the court evaluated Ramsey's claim that he was limited for a brief time in his use of the legal library because of a lockdown. Ramsey had alleged that, due to the status of a prison lockdown that lasted from March 30, 1997 to April 1, 1997, and again from April 3, 1997 until April 20, 1997, he was unable to make phone calls or use the legal library. *Id*. at *6. The court found that despite the lockdown period, Ramsey had ample time prior to the lockdown to file his § 2255 motion (approximately two years before the enactment of AEDPA and another ten months after the enactment of AEDPA, prior to the lockdown). *Id*. at **6-7. The court further found that Ramsey did not argue that "he was prevented from writing his motion during the lockdown," nor that " he was prevented from utilizing the mail during the lockdown period." *Id.* at **7-8. Thus, the court held that without more, the brief period of lockdown did not rise to the level of an extraordinary circumstance. *Id.* at **8-9 (citing *Ego-Aguirre v. White*, 1999 U.S. Dist. LEXIS 3162, at *5 (N.D. Cal. March 12, 1999) (finding that 180 days of lockdown and limited library access do not support equitable tolling) and *Brooks v. Olivarez*, 1998 U.S. Dist. LEXIS 12239, at *2 (N.D. Cal. Aug. 5, 1998) (finding that AEDPA's one year limitation gives prisoners adequate time to file motion while

leaving room for unpredictable lockdowns and interruptions in research and writing time common in prison)). Ramsey sought to appeal the decision, but the Third Circuit denied a certificate of appealability on December 29, 2000, "for essentially the reasons cited by the District Court." *United States v. Ramsey*, docket no. 99-1858, Order (3d Cir. Dec. 29, 2000).

In *Perry v. Vaughn*, 2004 U.S. Dist. LEXIS 24094, at *15 (E.D. Pa. Oct. 17, 2003) *adopted by Perry v. Vaughn*, 2004 U.S. Dist. LEXIS 9829 (E.D. Pa. May 27, 2004), the court similarly held that a prison lockdown and restriction of library access alone do not constitute "extraordinary circumstances." In that case, the defendant alleged that there had been a 30-day temporary lockdown as a result of a prison riot, during which his personal property, including legal materials, was destroyed. *Perry*, 2004 U.S. Dist. LEXIS 24094, at *13. Moreover, conditions at the prison created a scheduling problem regarding access to the prison law library. *Id.* However, because the defendant could not demonstrate that these "circumstances actually impeded his ability to file a timely [motion]" by, for example, preventing him from writing his motion prior or utilizing the mail, he had not been prevented, in some extraordinary way, from asserting his rights. *Id.*

Moreover, the court notes that Shabazz had almost four months after the last lockdown to prepare his motion, in addition to almost seven months prior to the lock down. The lockdown, in total, lasted only for a period of 41 days. Thus, Shabazz's claim that the prison was on lockdown for a period for a brief period of time, which prevented his access to the law library and legal assistance, without more, does not warrant a finding of extraordinary circumstances.

B. Access to legal materials

Defendant's inability to gain access to his suppression hearing, trial and sentencing transcripts from his former attorney is also not sufficient to constitute extraordinary circumstances for the purpose of equitable tolling. First, in general, fault on the part of the attorney is not extraordinary. The Third Circuit has stated explicitly that, "In non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling." *Fahy v. Horn*, 240 F.3d 239, 243 (3d. Cir. 2001). To justify equitable tolling, the attorney misconduct must "[go] beyond garden variety neglect." *Seizinger v. Reading Hosp. & Med. Ctr*., 165 F.3d 236, 241 (3d. Cir. 1999); *see also Schleuter v. Varner*, 384 F.3d 69, 77 (3d. Cir. 2004) (holding that "egregious attorney misconduct may justify equitable tolling"). The Third Circuit has held that misconduct existed where, for example, the attorney affirmatively lied to the client that the attorney had timely filed the complaint and had sent the client a copy when, in fact, the attorney had done neither. *Seizinger*, 165 F.3d at 241. But the court narrowed even that exception in *Schleuter v. Varner*, 384 F.3d 69, 76-77 (3d. Cir. 2004). In *Schleuter*, the attorney claimed he would file a petition on behalf of the client but failed to do so. *Id.* The court refused to equitably toll the statute, distinguishing *Seizinger* as a situation where the "plaintiff was misled by what the attorney said he had done, not what he said he would do," thus the client could have ascertained that his attorney had been derelict. *Id.* at 76. And, because the client in *Schleuter* was aware of the relevant filing deadline, he would have had "a small window of time in which to file a *pro se* petition and save...his claims from dismissal as untimely." *Id.* Other instances of garden variety neglect that did not rise to the level of extraordinary circumstances have included where counsel failed to inform the client of the status of the case, *LaCava*, 398 F.3d at 276, advised the client of

incorrect filing deadlines, *Johnson v. Hendricks*, 314 F.3d 159, 162-163 (3d. Cir. 2002), and miscalculated the statutory filing period, *Christian v. Mechling*, 2006 U.S. Dist. LEXIS 55259, at *21 (E.D. Pa. Aug. 8, 2006). As demonstrated by these cases, many situations of attorney misconduct that hinder a client's case do not rise beyond garden variety neglect to a level sufficient to constitute extraordinary circumstances.

Defendant argues that because his attorney was acting adversely to his interests, he should not be charged with his attorney's errors. (Reply to Gov't's Resp. to Def.'s § 2255 Mot. at 3.) However, his attorney's failure to turn over transcripts cannot be said to rise to the level of attorney misconduct present in *Seizinger* as Shabazz's attorney did nothing akin to making affirmative misrepresentations about the filing of his claim. His attorney's behavior, which if true is not proper, is more like the situation in *Schleuter*, 384 F.3d at 78, where the attorney's conduct did not actually prevent the client from filing a timely petition, and the circumstances in *LaCava*, 398 F.3d at 276, where the attorney simply did not communicate with the client. Indeed, defendant was in fact able to file his motion without the transcripts, as he did, albeit in an untimely matter. Thus, defendant's claim that his attorney failed to turn over transcripts does not constitute egregious attorney misconduct necessary for a finding of "extraordinary circumstances."

Second, a lack of legal resources, including trial transcripts, does not constitute an extraordinary situation. "Where a petitioner is ultimately able to file his habeas petition, with or without having received replacement materials, the deprivation of legal documents does not justify equitable tolling." *Satterfield v. Johnson*, 434 F.3d 185, 196 (3d. Cir. 2006) (citing *Brown v. Shannon*, 322 F.3d 768, 773 (3d. Cir. 2003) (failure of attorney to obtain a complete set of trial

transcripts not an "extraordinary circumstance[]" justifying equitable tolling)); *see also Woods v. James*, 2005 U.S. Dist. LEXIS 41841, at *12 (E.D. Pa. Apr. 24, 2006) (stating "[t]he inability to obtain a trial transcript, standing alone, does not constitute an extraordinary circumstance warranting equitable tolling").

Thus, Shabazz's claim that he was unable to obtain his transcripts from his attorney, without more, does not warrant a finding of extraordinary circumstances.

C. Reasonable diligence

Lastly, even if a prison lockdown or lack of access to transcripts based on attorney misconduct were to rise to the level of extraordinary circumstances–either alone or jointly–defendant did not exercise reasonable diligence in filing his motion. A defendant acting with reasonable diligence is expected "to prepare and file at least a basic habeas petition," even without desired legal documents. *Brown*, 322 F.3d at 775; *see also Robinson v. Johnson*, 313 F.3d 128, 143 (3d. Cir. 2002) (finding that petitioner could have sought "to file a timely petition and then clarify it once he had access to his materials" and thus had not demonstrated the diligence necessary). Based on Shabazz's assertions, he was persistent in his repeated requests to his former attorney for copies of his transcripts. However, he was not reasonably diligent in filing his actual § 2255 motion on time. Defendant had more than 10 months when the prison was not on lockdown status during which he could have completed his motion. Moreover, defendant has not alleged that he was actually prevented from filing "a basic habeas petition" by his inability to obtain transcripts. By his own admission, he knew the filing deadline was

looming and he ultimately was able to complete a "barebones" motion. (Def.'s § 2255 Mot. at reverse side 6; Def.'s Decl. ¶ 24.) As defendant correctly asserts, such transcripts are helpful in drafting a persuasive motion. (Reply to Gov't's Resp. to Def.'s § 2255 Mot. at 7-8.) However, they are not necessarily essential, and reasonable diligence requires the timely filing of at least a basic motion. *Robinson*, 313 F.3d 142 (finding that defendant "filed his [motion] without the benefit of his removed legal papers, suggesting, if not demonstrating, that they were not necessary to his federal filing"). Thus, equitable tolling is not warranted in this case, and defendant's right to apply for federal habeas relief has expired.

III. CONCLUSION

For the reasons explained above, I will dismiss as untimely the instant motion under 28 U.S.C. § 2255. The court must now determine if a certificate of appealability should issue. A court may issue a certificate of appealability only if the defendant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires that the defendant "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.* As shown above, Shabazz's motion violates the one-year statutory filing period contained in AEDPA. Therefore, a certificate of appealability will not issue.

An appropriate order follows.

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Order

And now, this _____ day of October 2006, upon careful consideration of defendant Tariq Shabazz's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255, the response, and defendant's reply to the response, IT IS HEREBY ORDERED that the motion is DENIED.

IT IS FURTHER ORDERED that, the defendant having failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability.

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William H. Yohn, Jr., Judge